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IN THE
Supreme Court of the United States

October Term, 1965

No. 481

BABCOCK BOULEVARD LAND COMPANY and RED JACKET, INC.,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA

On Petitions for Writs of Certiorari to and Appeals from the Supreme Court of Pennsylvania.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO AND APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

Does the creation of a cul-de-sac constitute the condemnation of a property right of an abutting land owner when the land owner has not been deprived of access to his property?

Negatived by the Court below.

Respondent is satisfied with Petitioners' statement of question No. 2.

COUNTER-STATEMENT OF THE CASE

These cases are before your Honorable Court on appeal from and Petitions for Writ of Certiorari to the Supreme Court of Pennsylvania, which affirmed per curiam an order of the Court of Quarter Sessions of Allegheny County, Pennsylvania, dismissing Petitioners' (Plaintiffs below) exceptions to the awards of Boards of Viewers which had not awarded Petitioners any damages in an eminent domain action instituted by them.

The Petitioners are owners of contiguous tracts of land, situate in Robinson Township, Allegheny County, Pennsylvania. Both tracts front on Pennsylvania Legislative Route 765, Section 3-A, a limited access highway, known locally as Parkway West, hereinafter referred to as Parkway. The entire tract was formerly owned by an individual named George Peat. Prior to June 2, 1950, the Parkway did not exist. On June 2, 1950, the Commonwealth of Pennsylvania, acting through the Department of Highways, condemned a portion of the land of George Peat for purposes of constructing the limited access Parkway. By virtue of this condemnation, George Peat acquired a claim for damages against the Commonwealth. On June 23, 1952, George Peat settled his claim and executed an instrument entitled "Deed of Release and Quitclaim, Limited Access Highway." The release states, inter alia, that Peat releases "the Commonwealth or any agency or political sub-division thereof for or on

account of any taking, injury or destruction of property through or by reason of the improvement of the said road . . . or through or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways. A plan showing the proposed improvement is hereto attached and made part of this release". This plan and release has been made part of the Petition for Writ of Certiorari, and is marked Petitioners' Exhibit Number 1A.

On December 19, 1962, George Peat conveyed the entire tract to Babcock Boulevard Land Company, hereinafter referred to as Babcock, which in turn conveyed that portion now owned by Petitioner, Red Jacket Company, Inc., hereinafter referred to as Red Jacket, to Red Jacket.

The Babcock tract remains unimproved. Red Jacket has erected on its tract a one-story light-industrial building, wherein it conducts its business.

The tracts owned by both Petitioners front on Bell Road, a township road. Both tracts have unimpeded access to Bell Road. The access from Petitioners' property to Bell Road is today the same as it has always been. Petitioners still have access to the general system of streets. *There has been absolutely no diminution of Petitioners' rights as abutters on Bell Road.* Bell Road runs generally south to north through the tracts of the Petitioners. Immediately abutting a portion of the property of Babcock on the north is ramp "A". Ramp "A" is a one-way, limited

access ramp, via which traffic was previously able to enter the eastbound lane of the Parkway. Ramp "A" would be utilized by traffic originating in an area north of the westbound lane of the Parkway or, in the alternative, by traffic moving westward on the Parkway and which turned off of the westbound lane for the purpose, in effect, of turning around and driving eastwardly.

No portion of the property of Red Jacket abuts Ramp "A".

Bell Road in the course of its northward projection intersected Ramp "A". By virtue of the condemnation of June 2, 1950, it was legally permissible to turn right off of Ramp "A" into Bell Road. Traffic was not permitted to turn right from Bell Road onto Ramp "A". Thus, Ramp "A" was not limited access at the point at which a right turn off of Ramp "A" was permitted. All other portions of Ramp "A" were limited access. *Contrary to the assertion in their Petition, neither Petitioner Babcock nor Red Jacket ever had the legal right to drive from their respective tracts onto the parkway. In order to reach Petitioners' properties from the Parkway, it was necessary to turn right off of Ramp "A" onto Bell Road, and then traverse Bell Road to a point of entrance to Petitioners' tract.* Petitioners could drive from their property onto Bell Road. It was never legally possible to drive from Bell Road onto Ramp "A", and then onto the Parkway.

On October 9, 1957, in accordance with a plan duly signed by the Governor of the Commonwealth of Pennsylvania, the Commonwealth acting through the

Department of Highways, erected a barricade at the point of intersection of Bell Road and Ramp "A". The effect of this barricade was to convert Bell Road into a cul-de-sac. After the creation of the cul-de-sac, it was no longer possible to make a right turn off of Ramp "A" onto Bell Road. Petitioners' rights of access to Bell Road and Petitioners' rights as abutters on Bell Road have never been disturbed.

No portion of any land of either Petitioner was condemned by the Commonwealth of Pennsylvania.

Petitioners' basic contention, precisely stated, is that converting the road on which they abut into a cul-de-sac constitutes a taking of property from them, for which taking they are entitled to compensation.

The basic contention of the Commonwealth, concisely stated, is that the creation of a cul-de-sac is an act done within the police power of the state and does not constitute taking of a property right so as to entitle abutters to compensation.

REASONS FOR DENYING WRITS AND DISMISSING APPEALS

The Petitions for Writ of Certiorari Should Be Denied and Appeals Dismissed Because No Substantial Federal Question Exists and Prior Decisions of This Court, on Related Questions, Indicate That This Court Will Leave to State Courts the Determination of Such Issues as Have Been Raised by Petitioners

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Respondent respectfully states that the petitioners have not raised any question which has not, in effect, been previously decided by this Court. This Court should decline to review the judgments of state courts when those judgments and decisions are predicated upon reasonable and adequate bases and interpretations of state law. *Fay v. Noia,* 372 U. S. 391, 9 L. Ed. 2d 837 (1963).

This case when stripped of all embellishments amounts to no more than a cul-de-sac case. Petitioners' properties abut Bell Road. Prior to the erection of the barricade of which petitioners complain, access could be had on to Bell Road from the Parkway. Bell Road was converted into a cul-de-sac at its point of intersection with the Parkway. Thus, the petitioners are asking this Court to determine the rights of abutting property owners, under Pennsylvania law, in the streets on which they abut. Determinations of

such questions have traditionally been left to state courts. *Sauer v. City of New York,* 206 U. S. 536, 51 L. Ed. 1176 (1906); *Marchant v. Pennsylvania Railroad Company,* 153 U. S. 380, 38 L. Ed. 751 (1894); *Meyer v. Richmond,* 172 U. S. 82, 43 L. Ed. 374 (1898).

Marchant, supra, is on its facts virtually determinative of this case. In *Marchant* a portion of the street on which the plaintiff's property abutted was condemned by the railroad company for construction of an elevated railroad. The pillars supporting the elevated roadway were imbedded in the foundation of the street, however, they were not in front of the plaintiff's property. No portion of the plaintiff's land was taken or occupied in any way by the railroad. An action was instituted to recover for damages caused by smoke, dust, and noise created by the operation of the railroad. At the trial, the Court of Common Pleas instructed the jury that the damages were compensable. The Supreme Court of Pennsylvania reversing, ruled that the damages were noncompensable. This Court indicated that it would not interfere with the state court's determination of questions of state law. It was said at page 385:

> "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that Court in its construction of domestic laws, we should be obliged to hold, as has been often held in like cases (emphasis added) that we have

no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason."

In *Sauer*, supra, the city of New York had built a viaduct on 158th Street which had the effect of disturbing plaintiff's access, light, and air. The plaintiff alleged that the statute which authorized construction of the viaduct was invalid for failure to provide compensation for the rights of which plaintiff claimed to have been deprived. The statute had been upheld by the New York Court of Appeals. This Court affirmed that decision. The plaintiff alleged, inter alia, that the decision of the New York Court of Appeals denied him rights secured by the Federal Constitution. This Court said at page 548:

> "The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the State Court (Emphasis added.) It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; or it may determine that he has an absolute or unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The Courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public

> policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the law of the various states to a uniform rule which it shall announce and impose." (Emphasis added.)

It seems clear, and rightly so, that this Court will not take upon itself the burden of determining routine questions of property law in the several states. This presumes that no constitutional issues of monumental magnitude are presented. However, as indicated by Rule 19 (a), Rules of this Court, review on writ of certiorari should not be granted if the federal question presented is neither one of substance nor one decided contrary to applicable decisions of this Court. It is respectfully submitted that the question raised by petitioners is not only not a federal question of any substance, but was decided below squarely in line with the holdings in *Marchant* and *Sauer*.

In *Meyer v. Richmond,* 172 U. S. 82, 43 L. Ed. 374 (1898), the City of Richmond had authorized the Richmond and Allegheny Railway Company to construct a portion of its works in such a way as to obstruct the street on which plaintiff's property abutted. The Supreme Court of Appeals of Virginia had denied the plaintiff recovery of any damages. This Court affirmed. At page 95 it was said:

> If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria* he cannot be said to have been deprived of any property.
>
> *Marchant v. Pa. R.R.,* 153 U. S. 380.

The Court in *Meyer* went on to say, also at page 95:

> The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others, but is such damage or deprivation of property within the meaning of the constitutional provision? . . . Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide. (Emphasis added.)

Subsequent to the latter quote, the Court proceeded to discuss the cases of *Transportation Company v. Chicago*, 99 U. S. 635 (1878), *Chicago v. Taylor*, 125 U. S. 161 (1888), and *Gibson v. United States*, 166 U. S. 269 (1897). The injuries for which damages were sought in these cases were the result of consequential damages incurred during construction, but which ceased subsequent to construction. This Court made clear in each of these cases that the compensability of such damages was to be determined by the state courts and the disallowance of damages by the State tribunals did not constitute any affront to basic rights protected by the federal constitution. However, Respondent recognizes a difference in quality and degree between damages suffered during construction and the damage resulting from a permanent change in the street system which surrounds a property owner's land. These cases are cited by Respondent to emphasize the principle of non-interference in matters of state domestic law by this Court.

There is much language in the instant Petitions to the effect that the Petitioners have been deprived of

a property right without due process of law; thus contrary to the express provisions of the fifth and fourteenth amendments to the United States Constitution. It has already been shown that the domestic law of the State governs questions such as are raised here and the law of Pennsylvania relative to cul-de-sacs will be discussed in the next succeeding section of this brief. However, a comment on the allegation that Petitioners have been deprived of due process of law seems in order at this point.

The critical factor in determining if due process has been accorded complainant is whether a fair trial or hearing, governed by procedures fair, reasonable and adequate under all of the circumstances are available to the complainant. In this case there is no doubt but that such hearing and procedures were not only available but utilized by petitioners. The only matter about which petitioners can truly complain is that the law of Pennsylvania is unsatisfactory to them as applied to them. The Petitioners have been before a Board of Viewers, have taken exceptions in the Court of Quarter Sessions to the Award of said Board, have filed an appeal from the Award of the Board to the Court of Common Pleas, demanding a jury trial for which the law provides,[1] have argued the exceptions to the Award of the Board of Viewers in the Quarter Sessions Court, and have appealed the dismissal of the exceptions to the Supreme Court of

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[1] The proceedings in the Court of Common Pleas have been stayed pending outcome of these Petitions for Writ of Certiorari. Of course, no trials will be had if this Court affirms the Order of the Supreme Court of Pa.

Pennsylvania. All of these tribunals have ruled that the damages sought by petitioners are non-compensable. There is nothing unique about the damages allegedly suffered by petitioners. The statute and decisions of which Petitioners complain probably affect all members of the public at one time or another. The comment of this Court in *Marchant* at page 386 appears applicable to this situation. The Court said as follows:

> The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like conditions.

On this question the Court also said the following at pages 385-386:

> It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in "due process of law".

In summary, it is respectfully submitted that no substantial federal question has been raised by petitioners and that the questions raised have been decided in accordance with applicable decisions of Your Honorable Court, and the Petitions for Writ of Certiorari should therefore be denied and the appeals dismissed.

In Pennsylvania, the Creation of a Cul-De-Sac Does Not Constitute the Taking of a Property Right From Abutters so as To Entitle Abutters to Compensation

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Initially, it must be noted that a cul-de-sac can be created by two means: (1) The erection of a barricade as in the case at bar, and (2) the vacation of a portion of the street. In discussing this aspect of the law, courts and text writers have a tendency to use the terms *cul-de-sac* and *vacation* interchangeably. Because the resulting factual situations are generally the same, respondent will refer, without distinction, to language utilizing both terms.

It has been settled law in Pennsylvania since the early case of *Paul v. Carver,* 24 Pa. 207 (1855), that vacation of a portion of a public road is not an injury for which abutting property owners are entitled to compensation. In *Paul v. Carver,* the owner of land had directed, in his will devising it, that a street be laid out through it either by his heirs or the appropriate public officials. The street was laid out by public officials, but was vacated subsequently by an act of the legislature. The owners of adjoining lots claimed a right to occupy and build upon the vacated area and the plaintiff asserted that this constituted an injury to him because his property could no longer be conveniently reached. Plaintiff was an abutting owner on the street. The strong and clear language of the Court is virtually determinative of the issues in the case at bar. The Court said at page 211:

> To open new highways, whether streets or country roads, and to vacate those which are

> useless, inconvenient, and burdensome, is a power which must reside somewhere in every well regulated government. In our own we have many laws conferring this authority on courts, on county and township officers, on city and borough councils, and on special commissioners. In very many cases, also, the General Assembly has, by its own direct and immediate act, ordered that streets and roads should be vacated, as well as opened, widened, and otherwise altered. Do all these laws violate the constitution? We cannot find anything in that instrument with which they are in conflict. Surrendering the right of way over a public road to the owners of the soil, is *not* taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation . . . But a public road belongs to nobody but the state; and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place.

It is difficult to conceive of any restriction or change in a general system of roads and streets, or changes in the regulation of traffic which do not impose, to at least a small extent, upon certain members of the public, some burden or inconvenience which they were not previously required to sustain. Since early in the common law, courts have recognized the necessity of the vast majority of these "injuries" being ruled noncompensable. Such regulations and

changes might include the erection of stop signs, traffic signals, no-turn signs, or, perhaps, conversion of a three-lane highway to a two-lane highway. It is clearly within the police power of the state to enact such changes and regulations. So it is within the police power to determine that it is for the public safety and benefit that a road be terminated at a given point. A property owner does not have a vested right, of which he cannot be deprived, without compensation, to be able to reach a given street or highway within the general system of streets and highways, by a particular route. This, in effect, is the right of which petitioners claim to have been deprived. Nowhere in the petitions for writ of certiorari, do petitioners allege that they have lost access to Bell Road. The allegation actually is that it is no longer possible to reach the parkway via Bell Road. Respondent readily concedes that it is often convenient and financially remunerative to be able to reach a high-speed limited access highway via a short trip from one's property. But, it is emphasized that no property owner possesses a vested right to such a convenience.

In *McGee's Appeal,* 114 Pa. 470 (1886), the plaintiff was the owner of a lot on a street which was a thru street as the result of a bridge which formed a part of the street. The Pennsylvania Railroad Company under contract with the City of Pittsburgh proposed to remove this bridge. In accordance with an act of the legislature, the railroad company had contracted with the city that the city would vacate certain public right-of-way if the railroad would first

acquire the properties abutting the right-of-way to be vacated. The plaintiff's property was not one which the railroad was to acquire. The plaintiff filed a bill seeking an injunction to restrain the City of Pittsburgh and the railroad company from removing the bridge which formed part of the street upon which plaintiff's property abutted. The lower court had sustained a demurrer to the bill in equity. The Supreme Court affirmed the decree and said at page 476:

> "In the absence of any constitutional restriction the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted: Dillon on Mun. Corp., 666. In Pennsylvania, a highway is the property of the people, not of a particular district, but of the whole state; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives and at their pleasure: Phila. Trent. R.R. Co.'s, 6 Wh. 25. Prior to the adoption of the present constitution, there was certainly no restriction of the powers of the legislature, in this respect; the legislature had a clear right to vacate any public highway, with or without the consent of the person whose private interests are or may be affected by it."

It cannot be too strongly emphasized that petitioners are in virtually the same factual situations as were the plaintiffs in *Paul v. Carver* and *McGee's Appeal,* supra, petitioners and the latter plaintiffs retained the right of ingress and egress to and from

their properties. Upon leaving their properties, they could turn and move in either direction.

Petitioners make much of *McCrady Case,* 399 Pa. 586, 160 A. 2d 715 (1960).

The Commonwealth had in addition to taking a portion of the plaintiff's land, erected within the right-of-way previously acquired by the Commonwealth, a curb which had the effect of so restricting ingress and egress to and from the subject property as to render it virtually useless for the purpose for which it was being utilized. The property was being utilized as a gasoline service station, restaurant and parking area. The Commonwealth contended that the installation of the curbing was an act done within the police power of the state and was therefore not a factor to be considered in evaluating the damages sustained by the landowner. The Supreme Court rejected the Commonwealth's contention and held that the installation of the curbing was part and parcel of the taking. Thus, the installation of curbing was an act done under the power of eminent domain and therefore compensable. The facts in McCrady are easily differentiated from those in the cases at bar. The McCrady property was, for practical purposes, deprived of any access. *Petitioners, it must be repeated again, have the same access, ingress and egress which they have always had.*

However, certain statements of the Court in *McCrady* are applicable here. The Court said at page 591:

> "In the determination of this issue certain well established principles of law must be kept in

mind. *First,* as stated by Mr. Justice (now Chief Justice) Jones in Koontz vs. Commonwealth, 364 Pa. 145, 147, 70 A. 2d 308: 'It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law (Sec. 304 of the State Highway Law of June 1, 1945, P. L. 1242), for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land.''

It was further said at page 592:

"*Second,* in the absence of any statutory provision providing therefor, the Commonwealth is not liable for consequential damages[3] incurred in the construction of highway [citing cases].

Third, unlike municipal and other corporations having the power of eminent domain, the Commonwealth is not within the provisions of Article XVI, Section 8, of the Pennsylvania Constitution."

Contrary to the implication on pages 19-21 of Petitioners' Petition, the Commonwealth is not in any way attempting to accomplish indirectly under the guise of police power that which it cannot do directly. The Commonwealth has not, in any way, shape or

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[3] "'Consequential damages' as defined by Mr. Justice (later Chief Justice) Kephart in Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 490, 162 A. 309, are those which 'arise when property is not actually taken or entered but an injury to it occurs as the natural result of an act lawfully done by another'."

form, exercised the power of eminent domain so as to take petitioners' property. In the same vein, the strong language quoted by petitioners on page 21 of their petition, from *Key Realty Company Zoning Case,* 408 Pa. 98, 182 A. 2d 187 (1961), has absolutely no application to the instant cases. The *Key Realty* case was a zoning case in which a building permit to erect an apartment building on a given parcel was refused. The language quoted is from the concurring opinion of Chief Justice Bell, and has no legal connection or application whatsoever to the present cases.

The doctrine of *Paul vs. Carver* and *McGee's Appeal* was affirmed in Pennsylvania by *In re Melon Street,* 182 Pa. 397, 38 A. 482 (1897). The street on which the plaintiff's property abutted was converted into a cul-de-sac. The plaintiff's property did not abut the vacated area. The condemnation was by the City of Philadelphia and a right to recover damages caused by the vacation of a street in Philadelphia was conferred by statute. However, the Court said at pages 401-402:

> "'Before the adoption of the new Constitution the Commonwealth was under no obligation to make compensation for damages caused by the vacation of streets: Paul vs. Carver, 24 Pa. 207. And for the purpose of this argument it may be conceded that since its adoption no such duty is imposed by the provision that compensation shall be made for property taken, injured or destroyed, and that the right to recover damages for injury so resulting exists only by virtue of special legislative provision: McGee's Appeal, 114 Pa. 470."

The case of *Moyer et ux. vs. Commonwealth,* 183 Pa. Superior 322, 132 A. 2d 902 (1957), is especially pertinent to the immediate issue. In *Moyer* the highway on which plaintiff's property abutted was relocated. "It [highway] was moved away from appellant's lot some 30 feet, and a fill varying from nine to fifteen feet was made. No land was taken. Access to appellant's property was accomplished by filling in a portion of the old highway and making a steeply declining approach from an intersecting street which approach ends in a cul-de-sac." *Moyer,* page 335. The Board of Viewers awarded the plaintiffs no damages because no land was taken from them. An appeal to the Court of Common Pleas was filed and this appeal was dismissed on motion of the Commonwealth. The Superior Court affirmed dismissal of the appeal. The plaintiff argued that even though no land was taken from them, they lost a property right as a result of the deprivation of their ingress and egress and the placing of a fill in front of their property. The Court said at page 336:

> Eminent Domain is an inherent attribute of sovereignty. However, the Constitution of the Commonwealth contains two provisions restricting the use of that power, namely, Article I, Section 10, and Article XVI, Section 8. It is important to note that Article XVI, Section 8, applies to municipal corporations, but not to the Commonwealth, whereas Article I, Section 10, is a limitation upon both. Article I, Section 10, requires compensation only for property "taken or applied to public use", whereas Article XVI,

Section 8, requires compensation "for property taken, injured or destroyed".

Thus, consequential damages do not constitute a condemnation of a property right under Article I, Section 10, of the Pennsylvania Constitution and Pennsylvania law clearly imposes no duty upon the Commonwealth to pay compensation for consequential damages. It could well be argued that the creation of a cul-de-sac is, in most instances, less burdensome than many other types of consequential damage. In the present cases the cul-de-sac was created by the erection of a barricade. Thus no property of any property owner was taken by the Commonwealth. The Petitioners have not been burdened with any increase in noise, dust, or smoke. No physical change of any sort has been made in the roadway upon which plaintiffs abut; i. e., for example, there has been no change of grade.

As can be seen, the Pennsylvania cases holding that the creation of a cul-de-sac or vacation of a road is not the taking of a property right for which compensation must be paid, are legion, and it is respectfully submitted that for this additional reason the Petitions for Writ of Certiorari should be denied and the appeals dismissed.

No Contract Existed Between the Commonwealth and Petitioners Whereby Petitioners Were Invested With the Right To Have Bell Road Remain Open at Either of Its Two Terminal Points

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On page 14 of the Petition, Petitioners refer to a statement made by the Court of Quarter Sessions (R. 127a) in the course of its opinion. The complete paragraph is as follows:

> "Common sense would indicate that there was no intent that the plan should confer on George Peat a contract right to require the Commonwealth to take so much of his neighbor's land and no more, that within its right-of-way the Commonwealth may do nothing in the way of additions and improvements without his consent, and that, in effect, the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion."

On page 15 of their Petition, Petitioners refer to the case of *Cincinnati v. Louisville R. R. Co.*, 223 U. S. 390, wherein this Court recognizes that Article I, Section 10, Clause 1,[1] of the Federal Constitution is not a limitation upon the power of eminent domain. That case holds, in effect, that a contract may be appropriated to a public use so long as compensation is made therefor.

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[1] Article I, Section 10, Clause 1, United States Constitution, states, inter alia, as follows: "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Respondent has no quarrel with the proposition that a contract may be appropriated and compensation made therefor under the power of eminent domain, but, even assuming, arguendo, that a contract could exist under these circumstances, petitioners fail to recognize that a contract, as any other species of property, is subject to the exercise of police power by the state, with its attendant inconveniences and noncompensable burdens. However, it is unnecessary to reach into the academic stratosphere in order to dispose of petitioners' contention. It has been held in Pennsylvania that the Commonwealth cannot divest itself of its police power. *The Pittsburgh & Connellsville R. R. Co. v. Southwest Pennsylvania Railway Co.*, 77 Pa. 173 (1874). In the latter case, the factual situation was that the appellee railroad contended that it had the right to construct and operate its railroad across the roadway and tracks of the appellant railroad. Appellant contended that the act of the legislature creating it prevented the legislature from permitting any other railroad to utilize the locations chosen by appellant. The Court said at page 186:

> Besides, we cannot presume the legislature ever intended to divest itself of the exercise of the police power of the state. The right to regulate railroad crossings naturally flows from that reserve power.

Your Honorable Court's attention is also respectfully referred to the case of *Titusville Amusement Co. v. Titusville Iron Works Co.*, 286 Pa. 561, 134 A. 481 (1926). The city of Titusville passed an ordinance

which "for the public good and benefit of the said city" vacated and closed as a public street a portion of a street in the city. Defendant, which owned property on both sides of the vacated area, desired to take possession thereof and erect a building upon it. Plaintiff, an abutter on the street, filed a bill in equity seeking to enjoin defendant from utilizing the vacated portion. The Court said at page 566:

> The city could not irrevocably bargain away the right and duty to vacate, when occasion required it, even for a valuable consideration, any more than it could, under like circumstances, barter away its power to open streets: Penna. Hospital v. Phila., 254 Pa. 392; affirmed on appeal in 245 U. S. 20.

Finally there is the case of *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission,* 168 Pa. Superior Ct. 360, 78 A. 2d 46 (1951). The Public Utility Commission had ordered the Philadelphia Suburban Water Company to remove its pipes from a portion of state highway, at its own expense, because the highway was to be reconstructed by the Department of Highways. The Court reiterated the principle that the State cannot divest itself of its police power and cited in support thereof *Pittsburgh & Connellsville R. R. Co.,* supra.

It seems almost fundamental that the sovereign cannot contract away its police power. A contract not to exercise police power would be a divestiture of one of the basic powers and reasons for the existence of government. The absence in government of

the power to regulate for the health, safety, morals, and general welfare of its citizens, who, after all is said and done, constitute the state, amounts to a virtual denial of the existence of civilized government.

There was clearly no contract between petitioners and the Commonwealth or between George Peat and the Commonwealth and the police power as exercised by the Commonwealth was well within proscribed limits as defined by this Court and the appellate courts in Pennsylvania.

Section 8 of the Pennsylvania Limited Access Highway Act Which Defies Payment for Consequential Damages Neither Denies Petitioners Due Process nor Equal Protection of the Laws

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The pertinent portions of the Act of 1945, May 29, P. L. 1108, § 8, 36 P.S. 2391.8, reads as follows:

> The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by the change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political sub-

division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance.

The Petitioner notes that the above-cited act uses the word "property" as distinguished from the use of the word "land". Respondent agrees that the word "property" is a more general term and would include certain incorporeal rights and easements not necessarily encompassed within the meaning of the word "land". However, distinctions of this sort, while often meritorious and of great legal importance, have no merit in the instant case. As was seen in the first part of respondent's argument, the Pennsylvania courts have held from early times that the right of which Petitioners claim to have been deprived, is not such a right, the taking of which is compensable. Thus, Petitioners are legally availed of little or nothing by the distinction made.

Petitioners also refer to the cases of *Griggs v. County of Allegheny,* 369 U. S. 84, 7 L: Ed. 2d 585 (1962), and *Gardner v. Allegheny County,* 382 Pa. 88, 114 A. 2d 491 (1955). Both cases held, in effect, that the utilization of air space above a property, by airplanes flying so low, as in taking off or landing, as to substantially interfere with the landowner's use and enjoyment of his property constitutes a compensable taking of a property right. Respondent has no quarrel with the holdings of these two cases. However, it is respectfully submitted that they have no application here. There is no doubt but that there are property rights, the taking of which is compensable, and that such rights may be other than ownership of

the land itself.' Still, there is no escaping the conclusion that petitioners rights do not fall within the latter category. As noted earlier, the damages suffered by petitioners are noncompensable, and thus distinguishable from the air space cases.

Petitioners further cite *Pennsylvania Coal Company v. Mahon,* 260 U. S. 393, 67 L. Ed. 322 (1922), as a landmark case in the development of the protection of private property against overzealous use of the police power. The *Mahon* case involved the validity of a Pennsylvania statute which forbade the mining of anthracite coal in a way as to cause a subsidence of, among other things, structures used for human habitation. The defendant [below] coal company, had years previously executed a deed conveying the surface on which the plaintiffs' [below] house was constructed. The deed expressly reserved the right to remove all the coal under the surface and the grantee expressly waived any right to damages arising from such mining. The plaintiff filed a bill in equity to enjoin the defendant from mining the coal. Plaintiff admitted the provisions of the deed, but contended that the statute, which was an exercise of the police power, took away the coal company's rights under the deed. The Court of Common Pleas held that the statute as applied to the case was unconstitutional, but the Supreme Court of Pennsylvania reversed. This Court reversed the Supreme Court of Pennsylvania. It was held that there are situations in which the exercise of the police power goes too far; so far as to amount to a taking and therefore the act becomes one under the power of eminent domain, for which

compensation must be made. The *Mahon* case is clearly distinguishable from the case at bar. The coal company was deprived of a tangible, corporeal right. Ownership of coal is meaningless without the right to mine it. The petitioners in the case at bar have not lost any tangible, corporeal right. They have lost a convenience and no more. Thus, Petitioners statement on page 23 of its petition, to the effect that *Sauer v. New York,* supra, has been strictly limited by *Mahon* is without merit. *Sauer* and the other similar cases cited in the first two topics of this brief denied property owners compensation for consequential damages. There was no question of consequential damages in *Mahon.* Rather, the coal company therein was directly and harshly forbidden to mine its coal, and as this court noted, "for practical purposes, the right to coal consists in the right to mine it".

As a further attack upon the Limited Access Highways Act, supra, Petitioners allege that it deprives them of the equal protection of the laws. It is respectfully submitted that this court should, if for no other reason, refuse to consider this allegation, because this most serious and fundamental issue was not timely raised. This allegation was made for the first time in petitioners' brief before the Supreme Court of Pennsylvania. Petitioners are actually before this Court upon petition to review dismissal of Petitioners' exceptions to an award of a board of viewers (R. 99a and 103a), which dismissal was affirmed by the Supreme Court of Pennsylvania. The exceptions alleged three reasons which are as follows:

1. The award is contrary to the facts adduced.
2. The award is contrary to the applicable law.
3. The award is inadequate.

Obviously the only reason which is even remotely connected with a denial of constitutional rights is reason number two. However, this reason is so vague that it could not be said to fairly include within it, an allegation that exceptants had been denied the equal protection of the law. As this court said in *Ellis v. Dixon,* 349 U. S. 458, 99 L. Ed. 1231 (1955), at page 462, "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issue asserted." The writ of certiorari in *Ellis* which had initially been granted was then dismissed as improvidently granted.

Continuing with their allegation that they have been deprived of the equal protection of the laws, petitioners allege that the statute in question provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways, but makes no provision for the purchase of property upon conversion of an existing road to a limited access highway. Initially it must be noted that even if this reason contained any merit, which respondent denies, it would have no application to petitioners claims and would therefore be moot and academic in these cases. This court does not sit to decide moot or academic issues. *Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70, 99 L. Ed. 897 (1955). Otherwise, the fallacy in Petitioners' contention is that the portions of the parkway upon which

their properties abut were always limited access. In fact, the parkway had always been, from its inception, limited access at the points on which it abuts Petitioners' tracts. The Township road on which the barricade was actually erected, never was and is not now a limited access road. Thus, contrary to Petitioners' assertion, no existing road has been converted to a limited access highway. However, respondent notes, as a point of information, that this Court in *Martin v. Creasy,* 360 U. S. 219, 3 L. Ed. 2d 1186 (1959), implied that a total deprivation of access, resulting from the conversion of an existing highway to a limited access highway constituted the compensable taking of a property right. With this implication, respondent agrees. This court in *Creasy,* did no more than to reverse an order of the Federal District Court for the Western District of Pennsylvania, enjoining the appropriate officials of the Commonwealth of Pennsylvania from erecting a limited access fence in front of complainant's property, thereby, depriving him totally of access. Petitioners herein point out that Mr. Justice Douglas dissented in part in *Creasy,* and would have determined in that proceeding whether access rights constituted property in the constitutional sense. It is respectfully submitted that the access rights referred to in that dissenting opinion were the access rights of abutters, who had been totally deprived of all access. Thus in *Creasy* they would have been deprived of private access while in this case the access blocked off is a public road. Petitioners are *not* in the same position factually or legally as the landowner in *Creasy.* Petitioners' access to the streets and roads on which they abut *on all sides* is no differ-

ent today than it was on the days on which they respectively purchased their tracts of land.

Petitioners also argue that they are deprived of the equal protection of the laws because the Limited Access Highways Act denies compensation for consequential damages when no property is taken, and the Act creating the Pennsylvania Turnpike Commission, Act of 1937, P. L. 774, No. 211, 36 P.S. 652, provides that the Turnpike Commission shall be liable for consequential damages absent a taking of property. In *Ewalt v. Pennsylvania Turnpike Commission,* 382 Pa. 529, 115 A. 2d 729 (1955), the Pennsylvania Supreme Court held, inter alia, that the Pennsylvania Turnpike Commission being an instrumentality of the Commonwealth, was not liable for consequential damages. It is noted that the Turnpike Commission was held liable for damages caused by a trespass and not by the exercise of the power of eminent domain. Therefore, the distinction which Petitioners make is nonexistent.

Finally, in support of their allegation of denial of equal protection, Petitioners attack that section of the Limited Access Highways Act, supra, which permits the Secretary of Highways to enter into cost-sharing agreements for property damages, with officials of political subdivisions, which assume such responsibility by resolution or ordinance. This allegation, as the first relative to equal protection raised by Petitioners, is academic. For that reason alone it should be ignored. *Rice v. Sioux City Memorial Park Cemetery,* supra. The Secretary of Highways did not enter into any such agreement with any political

subdivision in this case and therefore the question of the validity and constitutionality of such an agreement is not before this court. Respondent does note, however, that its position is that the damages payable under a cost-sharing agreement would be only those for which the Commonwealth would otherwise be liable. The import of the attacked provision was clearly not to make the Commonwealth liable for consequential damages. This conclusion must be reached in light of the specific language of this very section, prohibiting payment of consequential damages by the Commonwealth.

With reference to the vague and inconclusive implication that the latter section discussed paves the way for evil and malicious proliferation of political discrimination and influence, the record in this proceeding is fortunately devoid of any such charges. Such charges were never made prior to their appearance in appellants' brief for the Supreme Court of Pennsylvania. They are completely without factual or legal substance and should be ignored.

This Court has previously sanctioned the distinction between direct and consequential damages and such distinctions are reasonable and do not constitute a denial of equal protection of the laws. This Court said in *Marchant v. Pennsylvania Railroad Company*, supra, at page 389:

> The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude

them from the use of their accustomed highway, and the other classes suffered damages which were consequential on the use by the defendant company of their franchise and their own property. The question thus raised is within the case of Missouri v. Lewis, 101 U. S. 22, where it was said that "the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.

Petitioners have not been treated any differently nor does the statute in question treat them differently than any other property owner on Bell Road, on the Parkway, or for that matter anywhere in the Commonwealth of Pennsylvania. The classification is reasonable, predicated upon strong legal and practical bases, has been approved by this Court in prior decisions, and should again be affirmed here.

CONCLUSION

Respondent respectfully submits that Petitioners have not raised any substantive federal question or any question not previously ruled upon by Your Honorable Court in a manner contrary to Petitioners' allegations. Respondent therefore respectfully urges that Your Honorable Court deny the Petitions for Writ of Certiorari and dismiss the appeals.

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